



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 93 OF 2010

ARTHUR GITONGA GITAU.....APPELLANT

VERSUS

RWW (Suing through father and next friend CW.....RESPONDENT

(Being an Appeal from the Ruling of the Senior Resident Magistrate

Honourable G.A Mmasi in Eldoret CMCC No. 504 of 2001, dated 11th May, 2010)

JUDGMENT

This appeal arose from the decision of the Senior resident magistrate Hon. G.A. Mmasi delivered on 11th May 2010. The cause of action in the lower court was an injury sustained by the respondent when he was working on the appellant's sheller. The respondent had been instructed to stand next to the sheller holding a bag for the shelled cobs to drop and in the process he sustained injuries. The court found the appellant 100% liable and entered judgement in favour of the respondent. The respondent was awarded Kshs. 2000/- being special damages and Kshs. 400,000/- general damages for pain and suffering and loss of amenities.

The appellant filed the present appeal citing various grounds of appeal challenging liability and quantum. He faulted the magistrate for shifting the burden of proof to the appellant. He also faulted the magistrate for failing to find that the evidence tendered by the respondent exonerated the appellant from liability. He took the position that the respondent failed to prove his case on a balance of probabilities.

The appellant sought to have the appeal allowed and the decision on the lower court set aside.

The appellant submitted that the magistrate erred in law and in fact in shifting the burden of proof to the appellant which led to an erroneous finding on liability. The respondent failed to prove his case on a balance of probabilities.

The respondent did not lead evidence to prove the sheller belonged to the appellant. The appellant cited *Section 107(1)* of the *Evidence Act* which states that;

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”

He further relied on *Section 109* of the *Act* which states;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The appellant also cited **Kiema Mutuku v Kenya Cargo Hauling Services Ltd. (1991) 2 KAR 258** the crux of which was that a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

He further submitted that the respondent admitted that he had no evidence to prove the tractor belonged to the appellant and as a result there was no basis for finding him guilty without proving ownership. Further, that the burden of proof lay with the respondent to prove the sheller belonged to the appellant, and that the respondent failed to discharge this burden.

The appellant submitted that the respondent had not discharged the burden of proof in order for the evidential burden to shift to the appellant

and therefore the magistrate erred in shifting the burden of proof which led to an erroneous finding on liability. He relied on the case of *Mbogo v. Shah 7 Another (1968) EA 93* where the court set out circumstances under which an appellate court may interfere with a decision of the trial court.

The appellant submitted that for him to be liable there ought to be an existence of duty which was breached. It was incumbent upon the respondent to prove the existence of the employment relationship. The respondent did not establish any such relationship. Further, it was submitted that the sheller belonged to the appellants' son who was of majority age and that the respondent was engaged by the owner of the maize that was being shelled. The respondent ought to have sued the owner of the sheller; Joseph or the owner of the maize; Esther and consequently, the wrong party has been sued.

The appellant submitted that the respondent should have been awarded Kshs. 100,000/- being general damages and that Kshs. 400,000/- was excessive. He relied on the case of *Kenya Tea Development Agency v Augustine Gori Makori [2014] eKLR* where Kshs. 100,000/- was awarded for similar injuries. The appellant sought to have the appeal allowed and the judgement in the lower court set aside.

The respondent submitted that the burden of proof did not shift to the appellant at the trial court. The appellant owed a duty of care to the respondent as he was the employer. He relied on Winfield and Jolowicz on Tort 13th edition at page 203 where employers' liability was defined. He further relied on *Section 109* of the *Evidence Act* which states that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The respondents submitted that PW1 and PW3 were eyewitnesses who led evidence that the respondent was a minor employed by the appellant through his agent, James Mburu. The appellant did not lead evidence to prove that it was his son who employed the minor and not him. Neither did he bring forward evidence to prove that the sheller did not belong to him. He did not bring forward any evidence to show that the owner of the maize was one Esther Wangare Kimani and not him.

The respondent submits that the evidence and testimonies on record by the respondent was uncontroverted by the appellant. The onus was on the appellant to prove that the minor was employed by his son and the owner of the maize was one Esther Wangare Kimani and not him, which he failed to do.

The respondent maintains that the employer-employee relationship was proven and the appellant failed in his duty of care owed to the respondent. He exposed the minor to an unsafe working environment knowing the risk. Further, that the respondent proved his case on a balance of probabilities and that the evidence on record proved negligence on the part of the appellant. He maintained that the court did not shift the burden of proof as alleged.

The respondent submitted that the appellant did not tender any evidence and instead sought to rely on the principle of *res ipsa loquitur*. Further, the magistrate did not err when she found that the doctrine of *res ipsa loquitur* as relied upon by the appellant was misplaced. The doctrine of *res ipsa loquitur* requires an eye witness to explain what happened after which the presumption of negligence can be inferred. The appellant failed to bring witnesses to testify on how the accident occurred. It is the respondents' witness, PW3, who explained to the trial court how the accident occurred. The injury was foreseeable and the appellant failed to provide safe working environment. He also failed to train the respondent hence he was liable for the injuries sustained. He relied on the case of *Amani Kufaa Bakar v Wananchi Marine Products Kenya Limited; Mombasa High Court Civil Suit No. 209 of 2007* where the High Court of Kenya held that;

“It was not indeed enough for the employer to supply safe working system or appliances; the employer must ensure the system is followed and user trained”

The respondent submitted that the court did not err in holding the appellant 100% liable. He relied on the case of *Gough v Thorne (1966)* where the court held that;

“The test was whether a child of such age was to be expected to take precautions for his/her own safety and finding of contributory negligence should be made if blame could be attached to the child.”

Mudan J A further stated;

“A young person can be guilty of contributory negligence only upon proof that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act/omission.”

Considering there is no evidence on record by the appellant to show that the respondent had the capacity to know what kind of danger he was facing at the time, the court was justified to find the appellant 100% liable.

The respondent submitted that the award was justified and relied on the case of *Boniface Muthama Kavita vs Carton Manufacturers Limited HCCA 670 of 2003* where the court upheld the decision in the lower court where the appellant was awarded kshs. 350,000/- for injuries sustained on his finger while working as a machine attendant when removing waste from a printing machine. The respondent suffered permanent disability and deformity and he constantly suffers from intense pains as per the medical report. The appellant had sought Kshs. 700,000/- as general damages but the court awarded 400,000/-. The respondent submitted that the award was fair and just.

The facts raises the following issues for determination;-

- a. Whether the Respondent established the employer-employee relationship
- b. Whether the trial court shifted the burden of proof to the Appellant
- c. Whether the Appellant was liable for negligence
- d. Whether the award for damages was inordinately high

a. WHETHER THE RESPONDENT PROVED THE EMPLOYER-EMPLOYEE RELATIONSHIP

The crux of the claim is that there existed a duty of care on the part of the respondent. For a duty of care to arise between an employer and an employee, there must be proof that there was the existence of an employer-employee relationship. Section 2 of the employment act defines an employee as follows;

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;”

The Appellant had admitted in his testimony that the respondent had been given work but he stated that the work had been given by Esther. It is therefore undisputed fact that he had been given work. What remained to be established is who hired the sheller as he stated that the workers were hired by the person who had hired the sheller. The person who hired the sheller was one Esther Wangare Kimani who is not a party to the suit. She however had paid the respondent some money when the minor was injured. The respondent denied that the same was compensation.

A perusal of the proceedings shows a contradiction by the magistrate as she states, at page 21 of the record, that the Appellant admitted that his son hired the minor whereas the testimony on page 37 shows that he testified that it was Esther who hired the respondent. I opine that on a balance of probabilities, there was no proper establishment of the employer employee relationship between the appellant and the respondent.

b. WHETHER THE TRIAL COURT SHIFTED THE BURDEN OF PROOF TO THE APPELLANT

Both parties have cited section 109 of the Evidence Act which states that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The appellant however stated that the sheller/tractor belonged to his son. Section 112 of the evidence act states;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

It therefore follows that the burden of proof was shifted and rightly so. There was no error on the part of the magistrate in shifting the burden of proof as the appellant was in a better position to disprove the fact alleged by the respondent on ownership of the sheller.

c. WHETHER THE APPELLANT WAS LIABLE FOR NEGLIGENCE

There was no employer-employee relationship proven to exist between the appellant and the respondent.

Halsbury’s Laws of England 4th Edition Pg. 662 states;

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

In *M (A Minor) v Amullenga & Another [2001] KLR* the court held thus:

“In order to succeed in an action for negligence the plaintiff must prove:

- (a) That the defendant owes the plaintiff a legal duty.
- (b) That the defendant was in breach of that duty.
- (c) That as a result of the breach of that duty the plaintiff suffered damage.”

The respondent failed to establish an employer-employee relationship between the respondent and the appellant and consequently failed to establish a duty of care. It therefore follows that the court erred in finding the appellant liable as he had no duty of care. Even in the event of

ownership of the sheller, the same does not automatically mean that the appellant was the employer of the respondent. It is more probable that the person who hired the sheller was the employer in this case, as opposed to the appellant.

d. WHETHER THE AWARD OF DAMAGES WAS INORDINATELY HIGH

In *Boniface Muthama Kavita v Carton Manufacturers Limited [2015] eKLR* the court declined to disturb the award for general damages that was given in the trial court to the tune of Kshs. 350,000/- for injuries sustained that resulted in his left ring and little fingers being completely amputated.

The appellant has not demonstrated that the award of Kshs. 400,000 was inordinately high nor has he shown that the learned trial magistrate took into account an irrelevant factor in his assessment of damages. I find that the award of damages was not inordinately high.

However, given that there was failure to establish an employer-employee relationship, this appeal succeeds as the claim was based on negligence of which in the absence of prove of the relationship that would give rise to the duty of care deems the claim dead on arrival.

The appeal is therefore allowed with costs to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of March 2019

In the absence of:

The appellant

And in the presence of Ms Wahome for the respondent

Mr. Mwelem – Court assistant